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August 26, 2016

FILED THROUGH ECFS IN MB DOCKET No. 15-216

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Bewitched, Bothered and Bewildered

Dear Ms. Dortch:

Recently, Matt Polka, the American Cable Association's President & CEO, called attention to what he refers to as the FCC's "Jekyll and Hyde" approach to policy.¹ To illustrate, he pointed to Chairman Wheeler's July decision to refrain from changing the retransmission consent rules in this proceeding²—a choice Mr. Polka describes as "out of step with Wheeler's general approach and stated interest in consumer protection." He dates the emergence of the agency's bipolar policy personality from the time of President Obama's call for regulation of ISPs under Title II in late 2014.

Maybe Mr. Polka is on to something. Upon taking office, Chairman Wheeler said this in his "Opening Day at the FCC" blog entry:

During my confirmation hearing I described myself as "an unabashed supporter of competition because competitive markets produce better outcomes than regulated or uncompetitive markets." Yet we all know that competition does not always flourish by itself; it must be supported and protected if its benefits are to be enjoyed. This agency is a pro-competition agency.³

¹ Jenna Ebersole, *Small-Cable Chief Knocks "Jekyll and Hyde" FCC Policies*, Law360, Aug. 8, 2016, http://www.law360.com/telecom/articles/825736?nl_pk=8ee4c22e-63af-4cfe-ac66-01c291f85fc4&utm_source=newsletter&utm_medium=email&utm_campaign=telecom.

² Tom Wheeler, *Opening Day at the FCC: Perspectives, Challenges, and Opportunities*, Nov. 5, 2013, <https://www.fcc.gov/news-events/blog/2013/11/05/opening-day-fcc-perspectives-challenges-and-opportunities>.

³ See Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, July 14, 2016, <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules>.

In his first policy speech at Ohio State University a short while later, the Chairman emphasized that “competition is our fundamental national economic policy.” He presented as his “bottom line on competition” this proposition: “Our goal should be to ask how competition can best serve the public—and what, if any, action (including governmental action) is needed to preserve the future of network competition.” He said that “[i]f . . . a market is competitive, the need for FCC intervention decreases.” But, he noted, “competition does not and will not produce adequate outcomes in the circumstance of significant, persisting market power or of significant negative externalities” and said that “[w]here these occur, the Communications Act and the interests of our society—the public interest—compel us to act and we will.” The Chairman recognized that “Congress has given us tools to accomplish [the] goal [of promoting competition]” and vowed that “[w]e will use them in a fact-based, data-driven manner.”⁴

He stayed true to these principles in his public remarks after the speech. Thus, while concluding that some form of net neutrality rules were needed, he seemed to be leaning toward a “light” touch because the data did not support the need for the more intrusive approach urged by some professional ISP-bashers. With regard to retransmission consent, he lamented that consumers were suffering because of blackouts and rising retrans fees, which he noted had “skyrocketed from \$28 million in 2005 to \$2.4 billion in 2012, a nearly 8,600 percent increase in seven years.”⁵ He proposed to repeal FCC rules protecting broadcast stations’ local monopolies over network programming.⁶ And, in announcing the launch of this proceeding, he promised a “robust examination of practices used by parties in retransmission consent negotiations,” with the goal of “ensur[ing] that these negotiations are conducted fairly and in a way that protects consumers.”⁷ Besides talking the talk, he actually walked the walk on one occasion, leading the Commission to adopt a limit on the ability of unrelated broadcasters to negotiate retransmission consent jointly.⁸

⁴ *Prepared Remarks of FCC Chairman Tom Wheeler at The Ohio State University*, Dec. 2, 2013, <https://www.fcc.gov/document/remarks-fcc-chairman-tom-wheeler-ohio-state-university>.

⁵ See Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, Mar. 6, 2014, <https://www.fcc.gov/news-events/blog/2014/03/06/protecting-television-consumers-protecting-competition>.

⁶ John Eggerton, *FCC Order Would Ax Syndex, Network Non-Duplication Rules*, *Broadcasting & Cable*, Aug. 12, 2015, <http://www.broadcastingcable.com/news/washington/fcc-order-would-ax-syndex-network-non-duplication-rules/143320>.

⁷ Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace*, Aug. 12, 2015, <https://www.fcc.gov/news-events/blog/2015/08/12/upgrading-media-rules-better-serve-consumers-todays-video-marketplace>.

⁸ See Ted Johnson, *FCC Sides with MVPDs, Puts Limits on Stations in Retrans Negotiations*, *Variety*, Mar. 31, 2014, <http://variety.com/2014/tv/news/fcc-sides-with-mvpds-puts-limits-on-stations-in-retrans-negotiations-1201150296/>.

Then something happened and the bottom fell out of the Chairman's bottom line. Piecing together the clues, it looks as though Mr. Polka is correct, and it all began to go south at around the time of President Obama's call in November of 2014 for the FCC to declare ISPs to be common carriers subject to 1930s-era regulation and "adopt the strongest possible rules" on net neutrality. Another notable event occurred on October 9, 2015, when the Chairs and ranking members of the Senate Commerce and Judiciary Committees delivered a letter counseling Chairman Wheeler to postpone repeal of the network non-duplication rule.⁹

At first, Chairman Wheeler pushed back against what some characterized as improper applications of political pressure intended to influence an independent agency's actions.¹⁰ His initial public response to the White House on net neutrality was to say, in essence, that the FCC would treat the President's remarks as just one more opinion to be placed in the record of the Open Internet proceeding, worthy of no more consideration than anyone else's.¹¹ The Chairman responded to the concerns of the Senators on network non-duplication in a letter described by a spokesperson for the National Association of Broadcasters as a "dismissive rejection" of their concerns and a "shocking disregard for the institution that confirmed him."¹²

Alas, the words were not matched by deeds. Shortly after the Chairman delivered these strong verbal defenses of the agency's independence, the Commission surrendered to the demand to subject broadband to Title II of the Communications Act and abandoned the initiative to repeal network non-duplication protection.

Some claim that Mr. Wheeler simply "caved" to outside pressures, following in the footsteps of a long line of predecessors who were "unduly influenced" by politicians¹³ or

⁹ See John Eggerton, *Senators Ask Wheeler to Stand Down on Exclusivity Rules*, Broadcasting & Cable, Oct. 9, 2015, <http://www.broadcastingcable.com/news/washington/senators-ask-wheeler-stand-down-exclusivity-rules/144863>.

¹⁰ See, e.g., Jim Puzzanghera, *FCC Democrats caved to Obama on net neutrality rules, Senate Republican Probe finds*, Mar. 1, 2016, <http://www.latimes.com/business/la-fi-net-neutrality-fcc-senate-20160301-story.html>; Brandan Sasso, *House Investigates Obama's Role in FCC's Net Neutrality Decision*, Feb. 6, 2016, <http://www.theatlantic.com/politics/archive/2015/02/house-investigates-obamas-role-in-fccs-net-neutrality-decision/456600/>.

¹¹ See *FCC Chairman Tom Wheeler's Statement on President Barak Obama's Statement Regarding Open Internet*, Nov. 10, 2014, https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf.

¹² See Mark K. Miller, *Wheeler: FCC's Exclusivity Rules "Redundant,"* TVNewsCheck, Nov. 24, 2015, <http://www.tvnewscheck.com/article/90293/wheeler-fccs-exclusivity-rules-redundant>. The spokesperson, Dennis Wharton, NAB's Executive VP of Communications, apparently is either ignorant of or oblivious to the fact that Congress, like the President, is not supposed to direct the Commission's regular operations.

¹³ See, e.g., Jim Puzzanghera, *FCC Democrats caved to Obama on net neutrality rules, Senate Republican Probe finds*, Mar. 1, 2016, <http://www.latimes.com/business/la-fi-net-neutrality-fcc-senate-20160301-story.html>

lobbyists for favored businesses.¹⁴ In this view, the FCC's Jekyll and Hyde persona noted by Mr. Polka reflects the agency's willingness to compromise the Chairman's pro-consumer instincts in the face of pressure from the White House or Silicon Valley to stray from the road to righteousness.

Perhaps. But there may be other explanations. One possibility begins with what we think is a more accurate analogy than Mr. Polka's. After all, Mr. Polka's main focus was television, a subject hardly meriting resort to great literature. Moreover, the theme of Robert Louis Stevenson's classic novella, *Strange Case of Dr. Jekyll and Mr. Hyde*, was dualism within a single person (and in English society at the time), but the recent history of the FCC seems more like a tale of two separate entities.

A better place to look for an analogy, therefore, would be the classic ABC sitcom *Bewitched*. That series, which debuted in 1964, revolved around a beautiful, good-hearted witch, Samantha or "Sam," who marries a mortal man, Darrin Stevens, a hapless and curmudgeonly advertising executive. Her vow to live as an ordinary suburban housewife and forsake use of supernatural powers was often broken as she resorted to magic in order to deal with each episode's assortment of improbable situations and zany characters.¹⁵

The show is credited by some with being the first to feature an "Evil Twin" as a recurring character.¹⁶ Samantha's cousin, Serena, had an identical face and was also a witch,

¹⁴ See, e.g., Brooks Boliek, *Wheeler tweaks net neutrality plan after Google push*, Politico, Feb. 25, 2015, <http://www.politico.com/story/2015/02/fcc-chairman-tom-wheeler-net-neutrality-plan-google-115502>.

¹⁵ While this premise may seem too thin to sustain a long run, the series managed to remain part of the prime-time lineup for eight seasons, ranking no lower than eleventh in the ratings for all but the last couple of years of its run. Fifty years later, the show is still viewed in syndication and sold on DVDs and OTT video services.

¹⁶ The Evil Twin story line had been used in television series before, but a particular evil twin appeared in only one or, rarely, two shows. Serena, on the other hand, appeared in 25 different episodes. A second noteworthy fact about the show involving character substitution was the great Darrin switch. For the first five years, Samantha's husband, Darrin, was played by Dick York, previously best known for his role in the 1959 film classic *Inherit the Wind* as Bertram Cates, the teacher of evolutionary theory patterned after John Scopes of the infamous 1925 "monkey trial." Starting with the first episode of the sixth season, however, Darrin was portrayed by Dick Sargent, best known for bit parts in classics of a different variety, such as *The Ghost and Mr. Chicken* starring Don Knotts. The producers did not publicize the switch, apparently hoping that viewers wouldn't notice, even though Sargent did not look, sound or act anything like York. The audience, of course, did see the difference and the show began a precipitous ratings decline that led to its cancellation after its eighth season, although historians of the collection of banalities known as broadcast television continue to debate over just how much the re-casting contributed to its demise. See Genevieve Koski, Chris Mincher, Josh Modell, Noel Murray, Keith Phipps, Leonard Pierce & Tasha Robinson, *The Darrin Effect: 20 jarring cases of recast roles*, Jul. 14, 2008, <http://www.avclub.com/article/the-darrin-effect-20-jarring-cases-of-recast-roles-2380>. York had to leave the show because of worsening back problems caused by an injury sustained while filming *They Came to Cordura* with Gary Cooper and Rita Hayworth. He became addicted to pain killers and, although eventually getting that monkey off of his back, continued to smoke three packs of cigarettes a day. Apparently, he was never paid residuals for *Bewitched* and, impoverished, died from emphysema at age 63.

but she was much more sultry, sophisticated and mischievous. Ordinarily, Serena could be distinguished from Sam because she was a brunette with a beauty mark on her cheek, while Samantha was a blonde with clear skin.¹⁷ Sometimes, though, Serena magically changed her hair color and removed the beauty mark so she could pretend to be Samantha, and, until the ruse was discovered, Darrin and others blamed Sam for Serena's misbehavior.

The Evil Twin story line was popular in 1960s TV.¹⁸ As the medium matured (if it is ever proper to associate that word with television), the theme continued to be recycled, but the stories became a bit more sophisticated. A common variation relies on the "Many Worlds Interpretation" of quantum mechanics proposed by physicist Hugh Everett III in 1957. The theory postulates the existence of many parallel universes, and each time there is a situation with multiple potential outcomes, additional separate universes pop into existence which are identical to ours except that there is a different outcome in each.¹⁹ To explain the popular

¹⁷ Television series running an Evil Twin episode routinely followed the practice of using one or two physical traits to distinguish the good character from the bad counterpart. For example, *I Dream of Jeannie*, which premiered a year after *Bewitched*, featured a naïve blonde genie dressed in red harem clothes who had an evil sister identical in appearance except for her dark hair and green outfit. For males, a goatee or eye patch was often the device that differentiated the two otherwise physically identical characters. A well-known example was the use of a goatee to distinguish bad Spock from good Spock in an episode of *Star Trek*.

¹⁸ See Miss Cellania, *Evil Twins from '60s Television*, Neatorama.com, Sept. 7, 2011, <http://www.neatorama.com/2011/09/07/evil-twins-from-60s-television/>. The theme had been used in cinema for a long time before reaching the small screen. For example, in the 1946 movie *A Stolen Life*, Bette Davis played twin sisters, with the bad one, Pat, pretending to be the good one, Kate, in order to successfully steal away the love of Kate's life, Bill. Later, after Pat dies in an accident, Kate pretends to be her in order to assume her place in the relationship with Bill, only to find that Bill no longer wants that relationship because he has discovered Pat's frequent infidelity. The film was a departure from the standard Evil Twin story up to that point because each twin assumed the identity of the other. (By the way, it all turns out well for Kate in the end when she reveals to Bill who she really is and he realizes that it is Kate with whom he has been in love all along.)

¹⁹ The theory hypothesizes that whenever a measurement at the quantum (subatomic) level is made that has the potential of producing two different results with non-zero probabilities, the act of measurement causes the universe to split in two, with each being identical except that the scientist doing the measuring in one universe records one result while the scientist in the other universe observes the second of the two possible outcomes. Classic quantum theory postulates that until the measurement is made, the object exists in a "superposition" of the two possible outcomes at once. Rather than causing the universe to split in two, a measurement "forces" a choice of one of the two states, which is the one that we observe. The famous "Schrodinger's Cat" thought experiment presented by a Nobel-prize-winning physicist can be used to illustrate the difference. In the experiment, a cat and a device that may or may not kill it are placed in an opaque sealed box. The question is whether, at any given moment after the box is sealed, the cat is dead or alive. Classic quantum theory would tell us that, before we perform a measurement—that is, open the box to look—we cannot know and so the two alternatives exist in a superposition of both outcomes. Once we open the box, however, we observe that only one of the two outcomes has occurred and so the other possibility vanishes. The Many Worlds Interpretation, on the other hand, predicts that the act of looking in the box causes the universe to bifurcate into two, with the cat being alive in one universe and dead in the other.

understanding of the theory, we need look no further than a scene from the CBS sitcom *The Big Bang Theory* during which a character opines that the comic book figure Archie and the two young ladies who compete for his affections, Betty and Veronica, exist in each of two distinct universes “and Archie's married to Betty in one and Veronica in the other.”²⁰

If the theory is correct, then travel between the separate universes might be possible through some sort of “wormhole.”²¹ This notion has spurred dozens of science fiction works,²² some of which involve the surreptitious exchange of someone living on our world for a physically identical, but evil counterpart from a parallel universe. Until the cross-over is discovered, the evil twin wreaks havoc for which the good guy is blamed.

The debate between physicists over the merits of the Many Worlds theory has endured without resolution since it was first propounded. There are some laymen, however, who think they have stumbled upon definitive evidence that parallel universes do exist and travel between them is possible. Surprisingly, the proof is not contained in the results of experiments with the Cern Large Hadron Collider or long-lost calculations discovered in a cupboard at Princeton University where Einstein taught and Everett studied.²³ Instead, it takes the form of different spellings of the name of a popular series of children's books. Apparently, there are individuals who are convinced to a certainty that they grew up reading stories about the “Berenstein

²⁰ In another segment, one of the show's lead characters, Sheldon Cooper, a sarcastic and narcissistic nerd, observes that “while I subscribe to the ‘many worlds’ theory which posits the existence of an infinite number of Sheldons in an infinite number of universes, I assure you that in none of them am I dancing.”

²¹ According to Einstein and a colleague, Nathan Rosen, a wormhole is a tunnel-like shortcut between two different points in space-time. This becomes possible because the warping of space-time postulated by Einstein's General Relativity theory causes the two areas to be in close proximity, even though traveling between them without the benefit of a wormhole might take an incredible amount of time. Those ascribing to the many-worlds theory postulate something similar but the connection is between separate universes rather than different regions or time periods in the same universe.

²² For example, the Fox/Sci-Fi Channel series *Sliders* was based on characters able to “slide” between alternative universes.

²³ See Amir Aczel, *Einstein's Lost Theory Describes a Universe Without a Big Bang*, Mar. 7, 2014, <http://blogs.discovermagazine.com/crux/2014/03/07/einsteins-lost-theory-describes-a-universe-without-a-big-bang/#.VyisZHpmrpl>, reporting the discovery of a handwritten manuscript by Einstein that had been lost because it was misfiled as a draft of a different paper; Ian Sample, *Eureka! Lost Manuscript Found in Cupboard*, Feb. 9, 2006, <http://www.theguardian.com/uk/2006/feb/09/science.research>, reporting that “[a] long-lost 17th century manuscript charting the birth of modern science has been found gathering dust in a cupboard in a Hampshire home;” *Darwin fossils found in long-lost cabinet collection*, Jan. 17, 2012, <http://www.sciencebuzz.org/blog/darwin-fossils-found-long-lost-cabinet-collection>, reporting that “[a cache of long-forgotten fossils mounted on glass slides—including some collected by Charles Darwin—has been discovered in a dusty cabinet at the British Geological Survey.”

Bears,” while there are others just as sure that the characters are actually named the “Berenstain Bears.”

Classical quantum theory would tell us that until we perform a measurement, we cannot know which group is correct. Until that time, the question of the proper spelling has two alternative answers with non-zero probabilities that exist in a superposition of both possible outcomes. Once we look, however, we should observe only one of the two possibilities and the other should vanish. In fact, that is what seems to happen when we check book titles at Amazon.com—the bear family’s name is consistently spelled Berenstain, with an “a,” rather than Berenstein with an “e.”

Some of those who insist that the name was Berenstein when they were children are unwilling to accept that evidence. The vividness of their recollections has led them to become adherents to the Many Worlds theory. There must be, they say, two parallel universes identical in all respects except for the spelling of the bear family’s name. They grew up in the one in which the spelling is “Berenstein” but at some point fell through a wormhole into the alternate universe in which the name is “Berenstain.”²⁴

Something like this may be going on with the FCC. The dramatic inconsistency between the Commission’s recent actions and the expectations created by Chairman Wheeler’s early pronouncements on policy and process suggests the possibility of two distinct Chairman Wheelers—the equivalents of Samantha and Serena. (Borrowing from Dr. Seuss’s *The Cat In The Hat*, we can call them Chairman 1 and Chairman 2.²⁵) There has to be another universe identical to our own except that the FCC there has been headed by Chairman 2, who finds market power to be just fine as long as concentrated in the hands of a few Silicon Valley corporations, unrestricted collection and use of personal information to be unobjectionable provided it is done by edge providers instead of wireline owners and 8,600 percent or greater increases in consumer costs to be perfectly okay so long as the money flows to powerful media companies with the ability to influence elections.

Somehow, just as the Obama administration was entering its final couple of years, a portal between the universes was opened and the two Wheelers were switched, ensuring our FCC’s cooperation in the White House’s plan to implement as many of its agenda items as possible through executive orders and agency actions.

Of course, the flip side of this proposition is that in the parallel universe there is an FCC which, under the guidance of Chairman 1 (the real Thomas Wheeler), is pursuing genuine

²⁴ See Mack Lamoureux, *The Berenst(E)ain Bears Conspiracy Theory That Has Convinced the Internet There Are Parallel Universes*, Aug. 19, 2015, <http://www.vice.com/read/the-berenstain-bears-conspiracy-theory-that-has-convinced-the-internet-there-are-parallel-universes>.

²⁵ This classic children’s book was published in 1957, the same year as Everett’s Many Worlds hypothesis.

reforms which will make a meaningful difference for consumers, instead of an agenda that reads like it was crafted mostly at Mountain View, California. Some may say I'm a dreamer, but it is even possible that the alternate FCC has by now used its authority to correct flaws in the markets for retransmission consent and non-broadcast programming, saving tens of millions of Americans billions of dollars.

Alas, we don't live in that universe. In this one, the FCC is spending a lot of time and money on correcting problems that either don't really exist or are of no real consequence to the vast majority of Americans. The prime example is net neutrality, where the Commission has subjected ISPs to outdated regulations designed for the telephone industry as it existed 80 years ago based solely upon theoretical threats to Internet openness supposedly presented by ISPs, even though there has not been a pattern of, or even as many as three, actual abuses.

In the same vein, the FCC is in the process of imposing on ISPs privacy requirements under Section 222 of the Communications Act, which was written to apply to plain old telephone service and doesn't fit broadband service. (For example, Section 222 is full of references to publishing telephone directories.) According to the Commission, that step is necessary in order to prevent ISPs' misuse of customers' personal information and usage data. It is proceeding despite the absence of any evidence that ISPs are actually committing privacy abuses or that existing laws would be inadequate if that changed.

In embarking on these two crusades against imagined enemies, the Commission seems to have fallen victim to the Don Quixote syndrome—a term used by a neurologist to describe the often harmless, but sometimes devastating “transformations from reading fictional literature.”²⁶ Perhaps the folks running the FCC have spent way too much time reading the likes of Susan Crawford and Phillip Dampier (both of whom, many would say, specialize in sensationalist fiction). What truly take the actions into the realm of the surreal, though, is the FCC's severe case of what psychologists call “inattentional blindness,” a syndrome best illustrated by a 1999 experiment in which researchers showed subjects a video of three people wearing white shirts passing around a basketball and asked them to count the number of times the ball was passed. About 30 seconds into the video, a woman in a gorilla suit strolled onto the scene, faced the camera, thumped her chest and walked away. Half of the experimental subjects were so fixated on the task of counting passes that they missed seeing the gorilla.²⁷

²⁶ See Ivan Iniesta, *The syndrome of Don Quixote*, Letters to the Editor, 26 Neurologia 316 (Jun. 5, 2011), http://www.elsevier.es/ficheros/publicaciones/02134853/addon/S0213485310001684/S300/en/295v26n05a90020352pdf001_2.pdf. Iniesta notes that in Miquel Cervantes' novel, Don Quixote went off to tilt at windmills after reading books about chivalry. A disturbing real-world example of the syndrome he cites is the assassination of John Lennon by Mark Chapman, who was influenced in large part by John Salinger's *The Catcher in the Rye*.

²⁷ See Charles Q. Choi, “Invisible Gorilla” Test Shows How Little We Notice, LiveScience.com, Jul. 11, 2010, <http://www.livescience.com/6727-invisible-gorilla-test-shows-notice.html>.

The Commission is so focused on inventorying the ways in which ISPs could conceivably misbehave in some imaginary world where they are completely unconstrained by concerns about the reactions of competitors, customer disapproval, existing laws or government authorities able to intervene if and when actual abuses were committed that it fails to see (or chooses to ignore) the gorilla in the room: the handful of search engine, operating system and application service providers and tech companies—such as Google, Netflix, Microsoft, Apple, Amazon and Facebook—which wield enormous power over the ability of Internet users to access content and of edge providers to effectively reach their intended audiences and which collect and monetize a huge amount of detailed data about the hundreds of millions of people who surf the Web and use Web-connected devices.

More importantly, the highly exaggerated threats supposedly represented by ISPs according to the small group of academics and bloggers whose careers are based on emulating Chicken Little don't really matter a whole lot to consumers. In the real world, their lives have never been negatively impacted in any measurable way by ISP behavior of the kinds addressed by the net neutrality and proposed Section 222 rules, even during all of the many years before those rules ever existed.

Similarly, although the FCC's pending set-top box proposal may be important to Google, which hopes to make even more billions, there is no evidence that the subject matters very much to very many pay TV subscribers, who have never been convinced that the alleged benefits of switching to STBs already available at retail are worth the bother and are unlikely to realize significant savings even if the FCC does adopt new set neutrality rules. Much the same may be said of the proceeding looking to impose price regulation on the BDS market—the facts and the data simply don't support the notion that the FCC needs to get involved.

All of these initiatives seemingly turn on its head the promise by Chairman 1 in his Ohio State speech to refrain from heavy-handed regulation where the case for intervention is not supported by hard data.

On the other hand, the Commission has not acted in situations where the facts and data clearly demonstrate that the relevant market is flawed and consumers are paying a price for the FCC's inaction. The market for retransmission consent, for example, has never been, and never could be, competitive because it lacks at least one essential prerequisite: multiple producers who sell products that are close substitutes for each other. On the supply side, broadcasters continue to be virtual monopolists with regard to specific programs that engender intense viewer loyalty, but on the demand side, there are multiple competitive distributors. Although there are important differences, essentially the same situation exists in the market for non-broadcast programming.

In both cases, prices keep increasing at ridiculous rates, putting a strain on the pocketbooks of millions, especially in our nation's smaller cities and towns where money is

tight for a lot of families. Consider Iowa, where Mediacom has its greatest number of cable customers. A study by the Iowa Policy Project shows that many Iowa households earn less or only slightly more than the amount required for a “basic needs budget.”²⁸ Nonetheless, a lot of them subscribe to a pay TV service, as is also true of even the poorest American households.²⁹ When push comes to shove, many consumers will sacrifice other items before cutting television service subscriptions.³⁰

The Commission’s 2014 Report on Cable Industry Prices found that the average price of the expanded basic tier of video service increased by nearly \$20 per month from 2006 through 2013.³¹ If that increase had been avoided or cut in half, consumers would have an extra \$120 to \$240 a year to buy their kids warmer winter coats or to use for a more basic purpose, such as putting food on the table or paying the deductible when they buy EpiPens for their children with allergies.³² Unless something changes, the situation will only get worse—according to one projection, the average monthly bill for pay TV will reach more than \$200 by 2020, compared to around \$86 in 2011 and \$123 today.³³

²⁸ Peter Fisher & Lily French, *The Cost of Living in Iowa—2014 Edition, Part 2: Many Iowa Families Struggle to Meet Basic Needs*, The Iowa Policy Project, Apr. 9, 2014, <http://iowapolicyproject.org/2014Research/140409-COL-Part2.html>.

²⁹ See Robert Rector & Rachel Sheffield, *Understanding Poverty in the United States: Surprising Facts About America’s Poor*, Executive Summary, Sept. 13, 2011, <http://www.heritage.org/research/reports/2011/09/Understanding-Poverty-in-the-United-States-Surprising-Facts-About-Americas-Poor>.

³⁰ See National Foundation for Credit Counseling, *Poll Reveals Consumers Committed to Retaining Cell Phone and Internet Service* (2010), <https://www.nfcc.org/poll-reveals-consumers-committed-to-retaining-cell-phone-and-internet-service/>.

³¹ See Federal Communications Commission, *Report on Cable Industry Prices*, Appendix 7 (rel. May 16, 2014).

³² See Tara Parker-Pope & Rachel Rabkin Peachman, *EpiPen Price Rise Sparks Concern for Allergy Sufferers*, The New York Times, Aug. 22, 2016, <http://well.blogs.nytimes.com/2016/08/22/epipen-price-rise-sparks-concern-for-allergy-sufferers/?action=click&contentCollection=Business%20Day&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>. Although the rate of increase in the price of EpiPens since 2007 has been extraordinary, it is still only a small fraction of the rate at which retransmission consent fees have grown since 2005. In response to expressions of outrage by parents and politicians that have been growing in volume recently, the pharmaceutical company that markets the EpiPen announced a few days ago measures that will reduce some consumers’ out of pocket costs for the product. See Andrew Pollack, *Mylan to Lower EpiPen Cost for Some Patients*, The New York Times, Aug. 25, 2016, <http://www.nytimes.com/2016/08/26/business/epipen-mylan-price.html>. By contrast, broadcasters are deaf to complaints about their pricing and practices, a clear indication of just how uncompetitive and dysfunctional the retrans market really is.

³³ See The NPD Group, *Pay-TV bills continue to increase by 6 percent, year-over-year, as consumer spending power remains flat*, Apr. 10, 2012, https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410/.

All of this is the reason Mediacom filed a petition for rulemaking detailing the practices engaged in by programmers and broadcasters that are driving up video service prices, restricting consumer choice, lowering broadband adoption rates and reducing the resources available to distributors for expanding and improving broadband capabilities. Filings in this proceeding and in MB Docket 10-71 reinforce those points with regard to retransmission consent in particular.

At OSU, Chairman 1 expressed support for a “see-saw rule” under which “when competition is high, regulation can be low.” Obviously, the corollary of that proposition is that when competition is low, regulation may need to be high. The Chairman also noted that the rule “gives companies control over their regulatory fates based on the degree to which they embrace competition in their markets.” Because of stations’ local monopolies over network programs, competition on the supply side of the market for retransmission consent is about as low as it can go. And, of course, broadcasters and their lobbyists have vigorously resisted, rather than embraced even wimpy measures that might offer a barely measurable chance that even a tiny modicum of competition could develop, such as repeal of the network non-duplication rule. Much the same can be said about the market for popular non-broadcast programming. It seems irrefutable that, based on these facts alone, someone who adheres to the see-saw rule should conclude that the Commission needs to strengthen its regulations and stiffen its backbone when it comes to retransmission consent and programming generally.

Despite Chairman 1’s words at OSU and later expression of sympathy for consumers negatively impacted by blackouts and price increases, the Commission has done little to even try to adjust market dynamics. After launching the proceeding in this docket with fanfare proclaiming the importance of protecting consumers, the Chairman suddenly announced last month that there would not be any revisions to the rules governing retransmission consent negotiations after all.

So, under the leadership of Chairman 2, the FCC has turned the policies articulated by Chairman 1 on their head. It imposes and proposes new regulations for ISPs, pay TV companies and BSD providers even in the absence of data proving a market failure or other compelling need for intervention. In other situations, such as retransmission consent, the agency ignores conditions that clearly call for a fresh approach.

Of course, the Chairman’s announcement that this proceeding is going nowhere fast tried to justify preserving the status quo by claiming that the rules, as written, couldn’t possibly be improved and that, in any event, give the Commission all it needs to address trouble as it arises through intervention in specific situations. With all due respect, if the rules are really adequate for the job, then why, as the Chairman himself noted in his March 6, 2014 blog entry, are blackouts continuing to occur and prices continuing to rise without abatement? Ad hoc intervention in a specific dispute if and when the FCC deems it sufficiently important has not proven to be an effective tool for protecting the public interest, a fact most recently demonstrated by the Dish/Tribune impasse, which continues despite the FCC’s involvement.

Even if blackouts could be avoided or quickly resolved through such means, history proves that consumers will nonetheless suffer because resolution inevitably means another exorbitant increase in retrans fees.

Moreover, the possibility of FCC intervention if a blackout actually occurs is a worthless tool for slowing the rate of growth in retrans fees because the amount that most distributors pay for most stations is set in contract renewals that are concluded without an actual blackout. Few MVPDs are willing to take a dispute to the point of a blackout in the hopes that the FCC will decide to jump in and that scowling and scolding by staff will actually make a meaningful difference because, while that process takes place, subscriber losses mount. So long as that continues to be true, any discount that a broadcaster might grant in order to end a blackout situation, either voluntarily or as a result of FCC pressure, will not be extended to other MVPDs. Thus, fees will continue to grow at exorbitant rates even if the FCC becomes more active in the most prominent blackout situations.

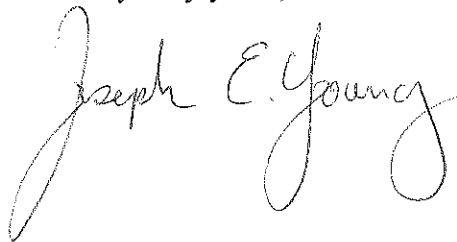
In that regard, we note that since Mr. Wheeler first spoke on the issue, the rate of growth in retrans fees has gone from 8,600 to 22,400 percent and billions more have been added to consumers' bills. Of course, throughout that time period, the FCC has been armed with the very same rules and tools that the Chairman claimed in his July announcement are entirely adequate to let the Commission do its job of protecting consumers.

All of this suggests that Chairman 1 has, indeed, gone missing—if not literally by falling through a worm hole into another universe or becoming a captive of 1600 Pennsylvania Avenue or 1600 Amphitheatre Parkway, then figuratively by acting in ways that Mr. Polka seems correct in characterizing as inconsistent with his verbal commitment to competition and consumer welfare. We need to get him back.

In any event, we strongly urge that the decision not to revise the rules governing retransmission consent be reconsidered and reversed because that choice dooms consumers to continued pummeling from the double whammy that Congress unambiguously directed the Commission to prevent: service interruptions and significant increases in subscriber costs at rates unprecedented in the case of any other product or service of which we are aware.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script, reading "Joseph E. Young". The signature is written in dark ink and is positioned below the typed name "Joseph E. Young".